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No. 98-873

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN CRANE, INC.,
Petitioner,
v.
JOHN ABATE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Maryland Court of Special Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this asbestos consolidated case, which involved five plaintiffs cases being tried to full verdict, constituted such a complex proceeding as to violate the defendant's rights to due process.

II. Whether, in a consolidated trial where use of trial plaintiffs is contemplated, does due process require that the trial plaintiffs be selected on a statistically sound basis.

PARTIES TO THE PROCEEDING

Petitioner accurately identifies the parties to the proceeding.

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OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland (Pet. App. A-1A to A109A) is reported and its citation is 121 Md. App. 590, 710 A.2d 944.

STATEMENT OF THE CASE

The present proceeding is the second consolidated to asbestos case conducted in the State of Maryland. It was conceived as a continuation of the initial asbestos consolidation, *AcandS, Inc. v. Godwin*, 340 Md. 339, 667 A.2d 116 (1995). The purpose of this case was to resolve the third party claims which had been severed from the *Godwin* proceedings. The resolution of the third party claims would require, as in every asbestos personal injury case, a lengthy presentation of state-of-the-art evidence, which includes medical articles, depositions and corporate documents to prove either actual or implied knowledge of

the defendants that their product's use was hazardous in order to satisfy the knowledge requirements of negligence and strict liability.

It became apparent that the resolution of the *Godwin* third party claims would represent a small return when compared to the cost and expenditure of judicial assets required by that trial. The *Godwin* court recognized that the necessity of the presentation of the lengthy state-of-the-art evidence in every asbestos case made asbestos cases particularly suitable for consolidation. The *Godwin* court's reasoning was as follows:

> "Issues involving a plaintiff's burden on state-of-the-art in an asbestos products liability failure to warn case are particularly appropriate for consolidation. Absent unusual circumstances, it is senseless to repeat the presentation of the same evidence against the same defendants in successive, individual trials or mini-consolidations. After only a brief introduction to asbestos litigation one recognizes that the same medical studies, medical journal articles, workers' compensation claims, third-party suits, depositions of witnesses, transcripts of court testimony, minutes of meetings, correspondence, and other exhibits are produced against the same defendants in trial after trial throughout the nation. Indeed, the documents have been photocopied so many times for an ever-expanding distribution among members of the plaintiffs and defense bars that the copies introduced into evidence are nearly illegible."

Godwin, 667 A.2d at 146.

It was determined that judicial economy would be served by using the same state-of-the-art evidence required to prove the third party claims to also resolve the same common issues in approximately 1300 asbestos cases which had been filed since the *Godwin* consolidated proceedings. The issues to be resolved in the third party cases and in the common issue plaintiff cases were the same; namely, whether the defendant manufactured, distributed or in-

stalled asbestos-containing products, whether the use of the product was hazardous, whether the defendant knew or should have known of the danger in the use of that product, and whether the product contained an adequate warning. Issues specific to a plaintiff's case would not be considered in the consolidation. These would be resolved in the future when groups of plaintiffs cases would be tried in mini trials where the jury would determine in each Plaintiff's case, whether a particular plaintiff sustained an asbestos-related disease, whether that Plaintiff was exposed to a specific defendant's asbestos product, whether that defendant's product was a substantial contributing factor to that disease, and whether the plaintiff suffered damages and the amount thereof.

It was also decided that trial plaintiffs would be utilized, as was done in the Godwin consolidation, to give the jury a better understanding of the issues involved in an asbestos case. Ultimately, five trial plaintiffs cases were tried to verdict against six defendants. The issues resolved in the trial plaintiff cases were the same as will be decided in each consolidated plaintiff's case when they are individually tried to final verdict in a mini trial.

The purpose of this consolidated case was to resolve defendant and product specific generic issues applicable to every Plaintiff's case in one proceeding, while affording each Defendant the due process protection of the opportunity to present a full defense as to its liability to each individual Plaintiff in a jury trial.

The trial was separated into three phases, the first involved the trial of the trial plaintiff cases, which also resolved the common issues involving the other 1300 consolidated plaintiff cases. The second phase of the trial involved the trial of the *Godwin* third party claims. The state-of-the-art evidence presented in the phase I proceeding was equally applicable to the second phase. The third phase of the trial involved the resolution of punitive damage issues.

SUMMARY OF ARGUMENT

A. There Is No Requirement That the Trial Plaintiffs Be Statistically Representative of All Consolidated Plaintiffs.

When each of the consolidated plaintiffs cases are in the future called to trial, each plaintiff will have the burden of proving the elements of his cause of action, including the fact that a specific Defendant's product caused that disease. The fact that a trial plaintiff may have proven in this case that one or more defendants were liable to him for his asbestos disease has no significance to any other consolidated plaintiff and will not lessen the burden of proof of any consolidated plaintiff in a mini trial. Crane's argument that the selection of the trial plaintiffs must be the result of a scientific sampling would have some merit if the trial plaintiffs cases were tried for the purpose of setting parameters for the settlement amounts of all consolidated Plaintiff cases, or if the verdicts in the trial Plaintiffs cases were by some mathematical formula extrapolated to set damages in all of the cases. The trial of the trial plaintiffs cases to full verdict is of no more significance than the result of any mini trial which is to follow. Crane's argument that due process requires that the selection of the trial Plaintiffs must be scientific in nature and representative of all consolidated plaintiffs, ignores the fact that Crane's liability to any consolidated Plaintiff is conditioned upon proof by each consolidated Plaintiff that Crane is responsible for his injury. All of the benefits of due process are available to Crane under the trial plan, and no damages may be awarded to any consolidated plaintiff unless his entitlement thereto is fully proven in a jury trial at which Crane will have the opportunity to present a full defense to each Plaintiff's claim.

B. The Consolidation Plan Afforded the Defendants a Fair Trial.

Crane's second contention that it was also deprived of its constitutional right to due process because of the com-

plexity of these consolidated proceedings is also not supported by an honest review of the consolidated trial plan and the actual conduct of these proceedings. In this case five trial plaintiffs were tried to final verdict against six trial defendants. The trial of multiple plaintiffs is the norm in asbestos personal injury trials in State and Federal courts. The issues raised and decided in this trial were no different than those required to be proven in any asbestos personal injury trial which is tried to full verdict. The first phase of this trial, which resolved the common issues in the consolidated Plaintiffs cases and also involved the determination as to Crane's liability in the five trial plaintiff cases, afforded Crane the unfettered opportunity to present all defenses which it wished to raise. In fact, the very defense that Crane claims it could not properly present was not only presented, but was accepted by the jury which agreed with Crane's assertion that Crane gasket products were not defective. A trial involving five plaintiffs being tried to final verdict against six defendants is certainly not the complex consolidated proceeding described in Crane's petition, and did not cause prejudice to Crane, and did not constitute a violation of Crane's right to due process.

REASONS FOR DENYING THE PETITION

I. THE USE OF TRIAL PLAINTIFFS IN THE PROCEEDING WAS NOT A VIOLATION OF THE DEFENDANTS' RIGHT TO DUE PROCESS

There was no violation of due process in the selection of the trial plaintiffs in these proceedings. Crane's argument that there must be statistical certainty in the selection of the trial plaintiffs and that they be exactly representative of the common issue plaintiffs ignores the fact that there was no linkage between the verdicts in the trial plaintiffs cases and the other consolidated plaintiffs' claims. No matter what verdict the jury reached in the trial plaintiff's cases, the common issue plaintiffs will, in the future, present the same issues to another jury in a mini trial.

In making this argument, Crane uses authority that is inapplicable here, since that authority relates to consolidated cases in which bellwether plaintiff cases are tried for the purpose of determining the rights of all consolidated plaintiffs. In cases utilizing bellwether plaintiffs, the obligations of the defendant and the rights of all consolidated Plaintiffs are determined by the trial of a representative sample of the Plaintiffs cases, without the defendant having the opportunity to present defenses or to contest the other consolidated cases in a trial before a jury. It is conceded that there are due process implications when a defendant's liability is established for an entire group of plaintiffs by the trial of representative plaintiffs cases which are selected as a reflection of the whole. In such cases, it is obvious that those results would be skewed if a statistically sound basis for the identification of the plaintiffs cases to be tried is not utilized.

Under the trial plan in this case, each and every plaintiff will be required to try his case in an individual proceeding with the obligation and burden of proving the liability of each defendant as in every other civil case. The fact that there is no practical or legal significance as to which consolidated plaintiff's case was tried in this consolidated proceeding becomes apparent when the court's trial plan is examined. The purpose of this consolidated trial was limited in scope. The intent of the trial was to decide generic Defendant and product specific issues which are required to be proven by the presentation of lengthy evidence in each individual Plaintiff's case. Since the proof required would be the same in every case, judicial economy is served by the resolution of these issues in one proceeding. Crane may believe that it is in its best interest that the plaintiffs be required to present the same lengthy evidence in each of the thousands of plaintiff cases which are to follow in order to litigate and re-litigate the exact issues that were determined in this case, but the court's refusal to do so is not a violation of any due process rights. This procedure will expedite the resolution of the mini trials, since only issues relating to a specific Plaintiff's cause of action will be

presented. When the trial court determined that judicial economy would be served if additional cases could be resolved in these procedings, 1,300 plaintiff cases which were filed since the *Godwin* case were selected for the purpose of resolving the same generic issues involved in the third party claims. The trial court then determined that trial plaintiffs, as in *Godwin,* would be tried to full verdict to give to the jury an understanding of the use of asbestos products, the manner that workers were exposed to asbestos, and insight into the development of asbestos diseases. The role of the trial plaintiffs in this case is a far cry from that described in *Chevron USA, Inc. v. Petitioner,* 109 F.2d 1016 (1997), which Crane claims as comparable to the instant case. *Chevron* involved thirty bellwether claimants whose cases were to be tried on a consolidated basis. The verdicts in these thirty cases would have a direct effect upon the remaining approximate 3,000 claims. The fundamental difference between the trial plan in the *Chevron* proceedings and that found here is made apparent by the Fifth Circuit's description of the *Chevron* plan.

> "On December 19, 1996, the District Court approved a trial plan. The trial plan provided for a unitary trial on the issues of 'general liability or causation' on behalf of the remaining plaintiffs, as well as the individual causation and damage issue of the selected plaintiff, and ordered the selection of a bellwether group of 30 claimants, 15 to be chosen by the plaintiffs, and 15 to be chosen by Chevron. Chevron contends that the goal of the 'unitary trial' was to determine its liability, or lack thereof, in a single trial and to establish bellwether verdicts to which the remaining claims could be matched for settlement purposes. It is this selection process which Chevron argues will not result in a representative group of bellwether plaintiffs." *Id.* at 1017.

Under the circumstances found in *Chevron,* it is, of course, imperative that a statistically valid representative sample of the entire plaintiff pool be presented to the jury,

since the result of the verdicts in the bellwether plaintiff cases was intended to set the responsibility of *Chevron* to all consolidated plaintiffs.

The trial plaintiffs in the present proceeding were not bellwether plaintiffs. A bellwether trial is held to answer issues common to the universe of the claimants, but the common issues resolved in the present case were directly the opposite, because they were issues that were common to the defendant. In the *Godwin* consolidation, the defendants challenged the constitutionality of applying these defendant and product specific common issue verdicts to each of the consolidated plaintiff cases. The *Godwin* court in rejecting that argument reasoned that even absent the consolidation of the common issue plaintiffs cases, issue preclusion would foreclose the defendants from relitigating those issues.

> "Although the format of the subject consolidation involves 8,555 actions, the special verdicts on the Phase I issues produce a result that is not any more adverse to the defendants than if a same special verdicts had been rendered in the trial of the claims of Leaf, Russell, and McNeal only. In that hypothetical the same Phase I verdicts when embodied in the final judgment, would give rise to issue preclusion or offensive, non-mutual, collateral estoppel. In that hypothetical any of the remaining 8,549 plaintiffs who claimed against one or more of the judgment defendants could use the Phase I jury findings that are part of the judgment to bar the judgment defendant from re-litigating the Phase I issues. (Citations omitted). The determinations adverse to defendants on the Phase I issues are no more a denial of due process than is the law of preclusion."

Godwin, 667 A.2d at 146.

Under this consolidated trial plan there is no reason to require the trial plaintiffs to be representative of the entire plaintiff pool. Due process is not implicated in the

selection of the plaintiffs which cases were tried when the trial plan contemplates that each individual consolidated plaintiff must prove each and every element of his cause of action in a separate trial before a jury.

II. THE CONSOLIDATED TRIAL PLAN DID NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS

In arguing that this consolidation plan was so complex that the defendants were unable to poperly present their defenses in a meaningful fashion, Crane compares the present consolidated trial to that described in *Malcolm v. National Gypsum Company*, 995 F.2d 346 (2d Cir. 1993). That comparison cannot be justified on any rational basis. In *Malcolm*, there were 25 direct defendants, numerous third and fourth party defendants and 48 plaintiffs whose cases were resolved on all issues. *Malcolm* involved 250 jobsites worldwide, while the present case involved only five, all located in the Baltimore Metropolitan area.[1] The complexity of this case cannot be measured by the number of consolidated plaintiffs to which the defendant specific common issues were applied, since the proof necessary for that finding would be exactly the same no matter how many plaintiffs cases would be affected. The complexity of a case such as this is measured by the number of plaintiffs whose cases are tried to final verdict. This same argument was raised by the defendants in the *Godwin* consolidation and rejected by the Court of Appeals of Maryland.

> "The defendants' principal argument for the unconstitutionality of the consolidation is that the number of parties, the number of issues, and the volume

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[1] The *Morrow* case involved exposures only at Western Electric Company. The *Goodman* and *Ciotta* cases involved exposures only at Standard Oil Refinery, and *Theis* and *Glensky* cases were proven at 3 jobsites, City Hospital, Fallon Office Building, and Murphy Homes.

> of the evidence make the proceeding so complex and overwhelming that it is beyond the capacity of the jury to resolve the issues on the law and the evidence, with the result that the defendants are deprived of a fair trial. It should be borne in mind, however, that the subject consolidation was not a consolidation of 8,555 cases for resolution of all of the issues in all of the cases in one trial. Because the same evidence that was introduced here would have been introduced if only the actions of the six illustrative plaintiffs had been tried, the merits of defendants' complexity argument should be tested, not by the number of parties who will be bound by the determination of common issues, but by the cases addressing the consolidation of multiple asbestos actions for full trial on the merits.

Godwin, 667 A.2d at 147.

The *Malcolm* consolidation involved 48 selected plaintiffs whose cases were tried to full verdict. In the present case, there were only five. The trial of 48 plaintiffs to full verdict required the jury to consider 48 specific medical histories and in each case to sift through the evidence for other factors which may have caused the condition, such as cigarette consumption, and to weigh and judge conflicting medical opinions in each case. In addition, in its liability findings concerning these 48 plaintiff cases, the jury would be required to consider the 250 sites where they worked, and to determine at each site what products were used in the Plaintiff's vicinity. The complexity of the present case bears no relationship to *Malcolm*, where the jury was literally deluged with evidence in support of the proof of 48 plaintiffs' cases at the same time.

In the present case, five plaintiffs went to full verdict and in proving their exposure to asbestos products of the six defendants testified as to only six jobsites. Crane, in support of its argument that its due process rights were infringed cannot articulate any specific prejudice which the

proceedings caused. The jury verdicts in this case are proof that Crane's ability to present its defenses was not impaired and that the jury was not overwhelmed and confused. Crane, along with another manufacturer of asbestos gaskets, presented a spirited defense in these proceedings that their gasket products were not hazardous because they were fully encapsulated and did not produce asbestos dust. The jury accepted Crane's defense and, in its verdict, found that Crane's gasket products were not defective. Any suggestion that these proceedings were so complex that meaningful defenses were foreclosed must be judged in light of the jury's verdict.

In its petition, Crane also infers that these proceedings were unfair, since, according to Crane, this is the first trial in which it has been found liable for asbestos injuries because of the use of its products. Crane's argument in this regard ignores the fact that this was the first case in which the plaintiffs were aware of and placed into evidence an air monitoring report which detailed air quality at Crane's manufacturing plant. That report revealed that unsafe levels of asbestos fiber were released into the air during a number of manufacturing processes, one of which was the cutting of Crane's sheet packing, which was the same operation that the trial plaintiffs in this case performed and which they alleged caused their injury. This document directly controverted Crane's defense that sheet packing, when it is cut and manipulated, does not release harmful asbestos dust. Since that time, that same document was allowed into evidence in the case of *James Scribner v. AcandS, Inc.*, Circuit Court for Baltimore City, November, 1998 trial cluster, consolidated case #98/33701/CX2561, Case No. 95284501. In that case, Crane was found liable to a single plaintiff who was awarded a total verdict of $5,241,500.00. Crane's position that it lost this case because of the complexity of the proceedings and because of a confused jury, is actually explained by the fact that the plaintiffs now possess documentation

that directly refutes Crane's defense that its sheetpacking products do not release respirable asbestos fibers.

In an effort to portray the jury in this case as confused by the complexity of the proceedings, Crane lists jury findings which it argues are incompatible with the evidence. These same allegations were fully briefed and argued by the parties in the Court of Special Appeals of Maryland. That Court in considering this argument held that:

> "Of all the allegations of jury error, only the Harbison Walker verdict sheets as to punitive damages and liability to *Goodman* and *Ciotta* clearly demonstrates significant findings that do not comport with the evidence presented at trial and could not be logically explained. The errors were corrected by the trial court."

The *AC&S v. Abate*, 710 A.2d at 969.

The jury verdicts which Crane claims are not based upon the evidence are actually instances where the jury accepted the plaintiffs' arguments and rejected the defendants'.

A. Starting Dates of Liability

Plaintiffs argued to the jury that the state-of-the-art evidence proved that by the 1930's any manufacturer or asbestos products should have known that its asbestos products were unreasonably dangerous, and that, as such, the defendant should be responsible for any asbestos products which they manufactured after that date without regard as to when a defendant claimed that it first manufactured an asbestos product. It was the plaintiff's position that the state-of-the-art evidence proved a date certain beyond which a defendant would be liable if it produced any asbestos-containing product. The jury accepted the plaintiff's argument and found dates of the beginning of liability consistent with the state-of-the-art evidence. The

Court of Special Appeals subsequently rejected plaintiff's theory of liability dates, but the verdicts by this jury in accepting plaintiff's theory of the case is certainly not evidence of jury confusion.

B. The Ending Dates of Liability

Crane also argues jury confusion is shown by the fact that the jury in the case of one defendant found that defendant liable for its product at a time after it had ceased to manufacture the asbestos-containing product. This argument omits the fact that the jury in rendering this verdict apparently accepted the plaintiff's argument that a defendant has a continuing duty to warn and has a continuing responsibility for its defective product after it ceases manufacturing that product. Crane obviously believes that responsibility ends upon the date of last manufacture, but that difference of opinion does not support an argument that this jury was confused or overwhelmed by the evidence.

C. Exposure Verdicts

Likewise, Crane argues that jury confusion is evidenced by the fact that verdicts of the jury concerning trial plaintiff exposures to certain defendants products were overturned. This argument was rejected by the Court of Special Appeals of Maryland which found that those verdicts were understandable because of plaintiffs argument to the jury that, because of the aerodynamic properties of asbestos, exposure can occur over great distances and time from the point of use. The Maryland Court of Special Appeals explained:

> 'In most circumstances, there was evidence that the particular appellant's product was used at the particular trial plaintiff's place of employment, but not at a time when or a place where the trial plaintiff could have been exposed to it. In closing argument, however, plaintiffs' counsel contended that asbestos

> 'fibers remain in the air, which exposes pretty much an entire workplace based upon how the wind is blowing and who is around.' Counsel added that the fibers 'become[] airborne again' during clean-up operations. The jury may well have accepted this argument, which set forth the so-called 'fiber drift theory.' The Court of Appeals has rejected the fiber drift theory, however, on the ground that it is inconsistent with Maryland requirements of causation. See *Balbos,* 326 Md. at 216-17, 604 A.2d 445.

AC&S v. Abate, 710 A.2d at 969.

It is apparent that the jury accepted plaintiffs' argument that exposure to a defendant's product may occur even though the plaintiff is not at the exact location of the use of the product or there at the exact time the product was present. There was a logical basis for the jury's finding that trial plaintiffs were exposed to the defendant's products under such circumstance, and there is no evidence supporting an allegation that the jury was somehow confused.

There is also no rational basis upon which Crane can argue that its rights to due process were somehow infringed because the jury verdict sheets required findings that categories of products were defective rather than by trade names. Crane's contention ignores the fact that the expert testimony in this case was that any product which released visible dust in its use was hazardous. No defendant, other than the gasket manufacturers, presented a defense that the use of its product did not cause harmful dust. It is significant that the gasket manufacturers were relieved of liability concerning those products because of that defense. It would be completely redundant for the verdict sheet to list each individual product by trade name for each defendant when there was no allegation that those products did not release asbestos dust. This argument also overlooks the fact that each individual plaintiff will be required to prove in a mini trial that the use of a specific defendant's product in his vicinity caused respira-

ble asbestos dust and that that exposure to that product was a significant contributing factor to his disease process.

Crane argues that the case was so complex and confused that it could not present a defense, but the record shows the opposite. Crane defended this action on the basis that its products were encapsulated and could not produce hazardous dust. The jury apparently accepted Crane's argument that gaskets, which do not have to be cut or shaped by the workmen before application, do not cause dust and are not defective. Crane has filed this petition because it was found liable for its sheetpacking products. Its defense concerning sheetpacking was the same, but the evidence in this case refuted Crane's encapsulation defense. During the course of these proceedings, Plaintiffs discovered a document from the Crane files which had not been produced in any other asbestos case. This document, a dust monitoring survey at the Crane manufacturing plant, showed that hazardous levels of asbestos dust were found in the plant, and that one of the manufacturing operations which was monitored was the cutting of gaskets from sheetpacking, the exact operation the plaintiffs in this case performed. Crane was found liable for its sheetpacking, not because the jury was confused or overwhelmed, but because the evidence refuted Crane's defense.

The issues presented in this case are no different than those found in any asbestos personal injury case tried to final verdict. The jury was charged with the resolution of five Plaintiff cases, which is not an unusual number of cases consolidated in asbestos litigation. When the exaggerations concerning the complexity of this case are put aside, the real issue presented in the Petition is whether the trial of five consolidated Plaintiffs cases constitutes a violation of due process.

Without being able to articulate one instance where it was prejudiced by these proceedings, Crane asks this Court to intervene for the purpose of promulgating unspecified rules to control the conduct of future consolidated trials.

It is significant that Crane's suggestion that this Court intervene to consider the constitutionality of the use of representative or bellwether plaintiffs in consolidated trials is not an issue which is presented by this case. Crane's general allegations concerning the complexity of this case also does not support intervention by this Court. The consolidated trial plan found in this case reveals a considered and practical approach to the resolution of common issues which require the same lengthy proof in each case, and which can be resolved in a single proceeding without prejudice to the parties. Such practical resolutions of multiparty litigation requires that the trial courts have unfettered discretion in formulating such trial plans. Crane's general allegations concerning the complexity of this case does not support intervention by this Court and is not an accurate description of proceedings involved. Crane is not liable to thousands of plaintiffs because of this case. It is liable to only five, and will not be liable to any other plaintiff until due process mandated trials are held in each plaintiff's case. This is not the mass consolidation described in the Petition, and does not present issues which justify consideration by this Court.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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